

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 9, 2004 Session

LARRY D. HOWARD v. LIFE CARE CENTERS OF AMERICA, INC.

**Appeal from the Circuit Court for Hamilton County
No. 03C272 Samuel H. Payne, Judge**

No. E2004-00212-COA-R3-CV - FILED AUGUST 20, 2004

This is a retaliatory discharge action brought pursuant to Tennessee's "whistleblower" statute, Tenn. Code Ann. § 50-1-304. The Plaintiff alleged that he was an employee and was wrongfully discharged because he complained to governmental officials about alleged Medicare violations by the Defendant. The Defendant denied these allegations and moved for summary judgment. The trial court granted the Defendant's motion for summary judgment and the Plaintiff appealed. We affirm the judgment of the trial court and find that although a genuine issue of material fact exists as to whether the Plaintiff was an independent contractor and not an employee, the Defendant did not discharge the Plaintiff but rather chose not to renew his contract upon its expiration. Accordingly, the Plaintiff is not entitled to the protection of the Tennessee whistleblower statute, and, therefore, we affirm the trial court.

**Tenn.R.App.P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and D. MICHAEL SWINEY, J., joined.

Anita B. Hardeman and Kent T. Jones, Chattanooga, for Appellant Larry D. Howard.

John C. Harrison, Chattanooga, for Appellee Life Care Centers of America, Inc.

OPINION

I.

Dr. Howard filed his complaint on February 4, 2003, pursuant to Tenn. Code Ann. § 50-1-304, known as the Tennessee "whistleblower" statute. He alleged that from 1996 through March 1, 2002, he was employed as the Medical Director at Defendant's Dwight Road, Chattanooga, TN, facility. On March 5, 2001, the parties entered into a contract styled "Medical Director Independent

Contractor Agreement,” which provided, among other things, for a one-year term commencing on March 3, 2001. Dr. Howard further alleged that:

During the course of his employment, he became aware of medical practices utilized by Defendant that violated, or gave him reason to believe would violate, Medicare guidelines and regulations including billing for services not medically necessary, billing for medical procedures not desired or requested by patients, and providing costly therapy sessions to elderly patients when there was no medical justification for doing so.

Dr. Howard alleged that after he had complained to the Defendant Life Care Centers of America, Inc. (“Life Care”) in writing several times about these practices, and also of activities reasonably believed by him to be medical malpractice, he contacted the Office of Inspector General and anonymously complained about the alleged Medicare violations. Dr. Howard alleged that after the Office of Inspector General made inquiry into Life Care’s Medicare billing practices, Life Care notified him that his employment contract would not be renewed after its expiration. The essence of the complaint is that by failing to renew the contract, Life Care violated the whistleblower statute, which states that “[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.” Tenn. Code Ann. § 50-1-304(a).

Life Care answered and moved for summary judgment, arguing that under the clear and unambiguous terms of the contract, which governs the parties’ employment relationship, Dr. Howard was an independent contractor and, thus, not covered under the statute. Life Care further argued it did not discharge or terminate Dr. Howard by failing to renew the one-year contract after it expired. The Trial Court granted Life Care’s motion for summary judgment. Dr. Howard appeals.

II.

In this review of a motion for summary judgment, our task is confined to reviewing the record to determine whether the requirements of Tenn. Rule of Civil Procedure 56 have been met. No presumption of correctness attaches to the lower court’s judgment since our inquiry involves purely a question of law. Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate when: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples v. CBL & Assoc., Inc.*, 15 S.W. 3d 83, 88 (Tenn. 2000).

The party moving for summary judgment bears the burden of proof that no genuine issue of material fact exists. See *Bain v. Wells*, 936 S.W. 2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. See *id.*

The moving party, in order to properly support its motion, must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. Once the moving party affirmatively negates an essential element of the non-moving party's claim or conclusively establishes an affirmative defense, then the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is triggered. *Blair v. West Town Mall*, 130 S.W. 3d 761 (Tenn. 2004).

III.

We note at the outset of our analysis that Dr. Howard has pled and proceeded solely on a statutory retaliatory discharge claim. He has not presented a common law retaliatory discharge tort claim. See *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn.2002) (holding that Tenn. Code Ann. § 50-1-304 “is cumulative to, and does not preempt, the common law tort.”). Although Dr. Howard's brief contains a section arguing that Life Care “materially breached [its] contract with Dr. Howard,” Life Care correctly asserts that a breach of contract claim was never raised at the trial level and is not properly before this court.¹

The employment-at-will doctrine has long been recognized in Tennessee. It affirms the right of either the employer or the employee to terminate the employment relationship at any time, for good cause, bad cause, or no cause at all, without either party being guilty of a legal wrong. *Stein v. Davidson Hotels Co.*, 945 S.W. 2d 714, 716 (Tenn. 1997). However, in recent years, restrictions have been imposed upon the right of the employer to terminate the at-will employee pursuant to statutory and case law. In 1990, the legislature enacted Tenn. Code Ann. § 50-1-304 as part of the Public Protection Act of 1990. This statute is commonly referred to as the “whistleblower” statute which is an exception to the common law employee at-will rule. The statute provides in relevant part:

(a) No **employee** shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.

* * *

(d)(1) Any employee **terminated** in violation of (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled. See Tenn. Code Ann. §50-1-304. (Emphasis added)

¹Moreover, Dr. Howard's reply brief contains the following statement, which we construe as conceding any breach of contract claim:

Dr. Howard's contention that Life Care violated his independent contractor status when it began to over-control his medical judgment is not a true claim for breach of contract but is obviously a point of argument on the pertinent issue: whether he was truly an independent contractor or an employee. Life Care need not worry about a new breach of contract claim under those circumstances.

The four elements of a prima facie case under Tenn. Code Ann. § 50-1-304 are:

- (1) Plaintiff's status as an employee;
- (2) Plaintiff's refusal to participate in, or to remain silent about, illegal activities;
- (3) Employer's discharge of the employee;
- (4) Exclusive causal relationship between the Plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

Hill v. Perrigo of Tennessee, No. M2000-02452-COA-R3-CV, 2001 WL 694479 at * 3 (Tenn. Ct. App. June 21, 2001); *Spivey v. Sumner County*, No. M2000-00771-COA-R3-CV, 2001 WL 459097 at *3 (Tenn. Ct. App. May 2, 2001).

The first issue then is whether Dr. Howard has shown that there are genuine issues of material fact as to whether he was an employee. Life Care argues that he was an independent contractor and, thus, not entitled to the protection of the whistleblower statute.

We first review the contract between the parties. Significantly, it is entitled "Medical Director Independent Contractor Agreement". It provides in pertinent part the following:

A. WHEREAS, Director desires to offer his services to health care facilities such as Facility as a consultant and independent contractor.

NOW, THEREFORE, for valuable consideration the parties agree as follows:

1. Term.

A. This Agreement shall commence on 03 March 2001, and shall continue in full force and effect for the period of a year, unless terminated in accordance with Section 1.B. or 1.C.

B. Either party to this Agreement may terminate the Agreement: (i) immediately, if the license of the other party is at any time suspended, terminated or revoked; (ii) with thirty (30) days written notice if the other party fails to perform any obligation under this Agreement and such failure to perform shall have continued for a period of thirty (30) days after notice thereof by the non-defaulting party; or (iii) with thirty (30) days written notice if there is a material change in statutory or regulatory requirements applying to the Agreement or services to be provided under the Agreement.

C. Facility may terminate this Agreement immediately if the Facility or federal or state regulatory authorities determine that the Services provided under this Agreement fail to meet applicable professional standards and principles or are not being provided on a timely basis. In addition, Facility may terminate this Agreement immediately if there is a breach of warranty or an event of default as defined in Section 8 hereof.

D. Notwithstanding termination of this Agreement, any unsatisfied obligation arising prior to the termination date shall survive the termination date until satisfied.

* * *

B. The parties understand and agree that Director maintains a private medical practice and either currently is, or may in the future be employed as a Medical Director for other nursing facilities. Although it is within the Director's sole discretion to determine the number of hours which he/she devotes in the performance of the functions of this Agreement, it is estimated that it will require a minimum of approximately 30 hours per month.

C. Director may arrange to have certain functions under this Agreement performed by other qualified healthcare professionals, but shall notify Facility in advance of any such delegation and shall provide Facility with information concerning the credentials and qualifications of any professional to whom duties are being delegated. Director shall be responsible for assuring that any functions so delegated are performed in accordance with this Agreement, and shall be responsible for reimbursing any individuals to whom Director delegates functions.

* * *

4. Independent Contractor.

In the performance of Director's duties and obligations under this Agreement, it is mutually understood and agreed that Director is at all times acting and performing these duties and functions in the capacity of an independent contractor; that the Facility shall neither have nor exercise any control or direction over the methods by which Director shall perform Director's Services, nor shall the Facility and Director be deemed partners. Director agrees to perform Director's Services,

at all times, in strict accordance with currently approved and accepted methods and practices in his profession. The Facility shall have the right to control the result achieved, but not the manner in which the work is performed. It is expressly agreed by the parties hereto that no work, act, commission or omission by Director pursuant to the terms and conditions of this Agreement shall be construed to make or render Director the agent, employee or servant of the Facility. Director shall pay all compensation, benefits, payroll taxes and worker's compensation for all personnel he furnishes hereunder, and hold the Facility harmless and free from liability or costs (including attorney's fees) arising from any claim or upon behalf of any governmental agency or any other entity or individual alleging that any individual furnished by Director is an associate of the Facility.

Dr. Howard argues that he was not an independent contractor by alleging that Life Care so thoroughly controlled the means and methods by which he performed his duties that in reality he was an employee of Life Care. In support of this assertion, Dr. Howard testified by affidavit as follows:

Esmerelda Lee [the Executive Administrator] then verbally instructed me that. . . I was in all cases to consult Paradigm [a psychiatric nurse practitioner group hired by Life Care] and directly follow the nurse practitioners' suggestions and plans as to how to treat patients, what medications to administer, the levels of medication, and when these medications were to be administered. I told her that Paradigm's visits were in direct violation of the Medicare rules for duplication of services and that I would be signing orders against my best medical judgment, however I was again instructed to follow these orders.

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I was never in control of my activities at Life Care. Life Care not only controlled the results that I achieved, but also the way in which I worked. It was very clear that they could have terminated me when they wanted to. The administrator, Esmerelda Lee, made it clear that I would be terminated if I did not accomplish my work their way.

In the case of *Hendrix v. City of Maryville*, 431 S.W.2d 292 (Tenn.App.1968), this court made the following pertinent observations regarding this issue:

In determining whether one is an independent contractor, the language of the contract is always considered but does not necessarily in all instances control. One must look to the contract, particularly its objectives, and the surrounding facts and circumstances as well as the subsequent conduct and relations of the parties to determine the true relationship.

* * *

When the contract is in writing and its terms are indefinite and ambiguous, or if the evidence shows that more than one inference can be drawn from the relationship, or if there is evidence of circumstances and relations outside of the written agreement, the written contract alone cannot be determinative but a question of fact arises which must be determined by the jury.

Hendrix, 431 S.W.2d at 296-97 (internal citations omitted). In light of the foregoing principles, we recognize that there at least arguably exists a genuine issue of material fact as to whether Life Care so thoroughly controlled Dr. Howard's conduct, in disregard of the contract, as to render him an "employee" under a Tenn. Code Ann. § 50-1-304 analysis. However, we find that irrespective of this question, summary judgment was appropriately granted to Life Care on the grounds that it did not "discharge or terminate" Dr. Howard's employment.

The contract unambiguously provides for a one-year term. The terms of the contract, which the parties presumably negotiated and bargained for at arm's length, do not include any provision for extension or renewal of Dr. Howard's position as Medical Director. It is undisputed that the one-year contract simply expired, and that Life Care informed Dr. Howard that it did not wish to enter into a new contract at the end of the bargained-for period.

Tenn Code Ann. § 50-1-304 requires that the employee be "terminated". This would clearly require an act on the part of the employer to end the employment relationship. In this case, the employment relationship ended by operation of the parties' contract and not due to any action on the part of the employer. The employer in this case did not terminate Dr. Howard. His employment contract simply expired. There is no authority in Tennessee which gives an individual the right to sue for failure to renew a contract and we do not deem it appropriate to create such a cause of action in this case.

We affirm the judgment of the trial court, and remand the case for collection of costs below. Costs on appeal are assessed against the Appellant, Dr. Larry D. Howard.

SHARON G. LEE, JUDGE